CAPITAL CASE

No. 18-_____

In the Supreme Court Of the United States

MELVIN BONNELL,

***Petitioner*,**
v.

TIM SHOOP, Warden,

***Respondent*.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

APPENDIX CONTENTS

No. 17-3886

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 27, 2019
DEBORAH S. HUNT, Clerk

IN RE: MELVIN BONNELL,

Movant.

ORDER

BEFORE: BATCHELDER, SUTTON, and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 17-3886

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 04, 2018
DEBORAH S. HUNT, Clerk

In re: MELVIN BONNELL,

Movant.

ORDER

Before: BATCHELDER, SUTTON, and WHITE, Circuit Judges.

Melvin Bonnell, an Ohio prisoner under sentence of death, filed a petition for habeas corpus relief under 28 U.S.C. § 2254 in April 2017. The district court transferred the case to this court as a second or successive petition by opinion and order entered August 25, 2017. Bonnell now moves to remand the case to the district court or, in the alternative, for additional briefing. The warden has filed a response opposing Bonnell's motion.

In 1988, Bonnell was convicted of one count of aggravated burglary, one count of aggravated (felony) murder, and one count of aggravated murder for purposely, and with prior calculation and design, causing Robert Bunner's death. He was also found guilty of one death penalty specification associated with each count of aggravated murder. The trial judge followed the jury's recommendation and sentenced Bonnell to death on each count of aggravated murder, and sentenced him to ten to twenty years of imprisonment for aggravated burglary. After exhausting his state court remedies, Bonnell filed a petition for a writ of habeas corpus in the district court in March 2000. The district court denied the petition in 2004. We affirmed. *Bonnell v. Mitchell*, 212 F. App'x 517 (6th Cir. 2007).

Bonnell filed a second habeas petition in April 2017, raising two claims: (1) he is entitled to habeas relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016); and (2) his rights to equal protection and due process were violated when the state trial court did not issue a final

appealable order in the judgment of conviction, which resulted in a jurisdictional defect. The district court found that Bonnell's petition was successive and transferred the case to this court pursuant to 28 U.S.C. § 1631.

To be entitled to an order authorizing the district court to consider a second or successive habeas corpus petition, the applicant must make a prima facie showing of: (1) a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable, or (2) newly discovered evidence which could not have been discovered previously through the exercise of due diligence and which would be sufficient to establish, by clear and convincing evidence, that no reasonable factfinder would have found the applicant guilty. *See* 28 U.S.C. § 2244(b)(2), (b)(3)(C); *Magwood v. Patterson*, 561 U.S. 320, 330 (2010). A numerically second petition is "second" when it raises a claim that could have been raised in the first petition. *McCleskey v. Zant*, 499 U.S. 467, 489 (1991); *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006). An application that presents a claim that would have been unripe if it had been presented in an earlier application, but ripened after an earlier habeas petition had been rejected, is not second or successive. *See Panetti v. Quarterman*, 551 U.S. 930, 945 (2007).

Bonnell's *Hurst* claim makes his proposed petition second or successive. Whether or not *Hurst* could apply to Bonnell's case, the Supreme Court has not made *Hurst* retroactive to cases on collateral review as required by 28 U.S.C. § 2244(b)(2). *See In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (citing *Tyler v. Cain*, 533 U.S. 656, 662-63 (2001)). Bonnell's argument that his *Hurst* claim ripened when the Supreme Court of Ohio applied *Hurst* retroactively is inapposite. "[T]he [United States] Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive." *Tyler*, 533 U.S. at 663. And in any event, the ripeness exception is inapplicable to changes in law. *In re Coley*, 871 F.3d at 457.

Bonnell also requests that this court remand the case to evaluate the Ohio Supreme Court's application of *Hurst* under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). He argues that remand is needed because interpreting 28 U.S.C. § 2244(b) to prevent retroactive application of *Hurst* would abrogate *Teague v. Lane*, 489 U.S. 288 (1989),

and would suspend the writ of habeas corpus. But "*Teague* is not controlling for collateral cases under AEDPA," *In re Clemmons*, 259 F.3d 489, 492 (6th Cir. 2001) (citing *Tyler*, 533 U.S. at 665-66), and the Supreme Court has expressly held that § 2244(b)'s restrictions do not suspend the writ. *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

Bonnell's due process and equal protection claim also makes his proposed petition second or successive. Bonnell argues that because the trial court's 1988 sentencing opinion omitted the aggravated burglary conviction, the court failed to issue a final, appealable order that complied with Ohio Crim. R. 32(C). Bonnell contends that because the original sentencing opinion was deficient, Ohio state courts never had jurisdiction over his direct appeal. In 2011, the Ohio Court of Appeals directed the trial court to issue a nunc pro tunc entry that included the fact and manner of conviction on Bonnell's aggravated burglary charge, but held that the corrected judgment entry would not be a new final order from which a new appeal could be taken because Bonnell had already appealed his conviction and sentence. *State v. Bonnell*, No. 96368 2011 WL 5506071 at *4 (Ohio Ct. App. Nov. 10, 2011); *see also State v. Bonnell*, No. 102630 2015 WL 6797870, at *5 (Ohio Ct. App. Nov. 5, 2015).

Bonnell's present challenge to the nunc pro tunc order would raise a claim or claims that could have been raised in his first habeas petition. *See McCleskey*, 499 U.S. at 489; *Bowen*, 436 F.3d at 704. Although Bonnell argues that this claim did not become ripe until the trial court issued the nunc pro tunc entry revising the original judgment in 2015, this challenge has been available to Bonnell since the time of his conviction and sentence in 1988 under Ohio Crim. R. 32(C). *See Bonnell*, 2011 WL 5506071 at *4; *see also State v. Lester*, 958 N.E.2d 142, 146–47 (Ohio 2011). "[T]he phrase 'second or successive' must be interpreted with respect to the judgment challenged." *Magwood*, 561 U.S. at 333. The Ohio Court of Appeals ruled that the nunc pro tunc order merely corrected a technical defect in the original judgment. Therefore, Bonnell's current application does not fall within an exception to the rule against second or successive petitions. *See Panetti*, 551 U.S. at 945.

For the foregoing reasons, we **DENY** Bonnell's motion to remand and for additional briefing and **DENY** permission to file a second or successive habeas petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MELVIN BONNELL, Petitioner, v. CHARLOTTE JENKINS, Warden, Respondent.	)	CASE NO. 1:17-cv-787 JUDGE SARA LIOI **MEMORANDUM OPINION AND ORDER**

This matter is before the Court on the motion of respondent Charlotte Jenkins ("respondent" or "Jenkins") to transfer the petition of Melvin Bonnell ("petitioner" or "Bonnell") for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. No. 1 ["Pet."]) to the United States Court of Appeals for the Sixth Circuit for authorization to proceed because the petition is barred as a "second or successive" petition under § 2244(b) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(b). (Doc. No. 7 ["Mot."].) Bonnell, a state prisoner, was convicted and sentenced to death in 1988. In the petition, Bonnell claims that: (1) his death sentence is unconstitutional under *Hurst v. Florida,* – U.S. – , 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) (Pet. at 25-36[1]); and (2) his equal protection and due process rights were violated when the state trial court failed to issue a final, appealable order in the judgment of conviction (*Id.* at 36-38).

[1]All references to page numbers are to the page identification numbers generated by the Court's electronic docketing system.

Petitioner opposed the motion (Doc. No. 9 ["Opp'n"]), and respondent replied (Doc. No. 10 ["Reply"]).[2] For the reasons that follow, respondent's motion to transfer is granted.

I. BACKGROUND

A. Conviction, Sentence, and State Court Appeals

In 1988, an Ohio jury convicted Bonnell of one count of aggravated burglary and two counts of aggravated murder of Robert Eugene Bunner. Following the jury's recommendation, the trial judge imposed a sentence of death. Bonnell extensively litigated issues related to his conviction and sentence in the Ohio courts, which affirmed his convictions and sentence on direct appeal and post-conviction review. *See State v. Bonnell*, 573 N.E.2d 1082 (Ohio 1991) (direct appeal); *State v. Bonnell*, 644 N.E.2d 1031 (Table) (Ohio 1995) (affirming denial of application to reopen direct appeal); *State v. Bonnell*, 704 N.E.2d 578 (Table) (Ohio 1999) (declining to exercise jurisdiction). The United States Supreme Court denied Bonnell's petition for a writ of certiorari. *Bonnell v. Ohio*, 528 U.S. 842, 120 S. Ct. 111, 134 L. Ed. 2d 94 (1999).

B. Bonnell's First § 2254 Habeas Petition

Bonnell first sought federal habeas corpus relief pursuant to § 2254 in this Court in 2000, raising twenty claims. *See Bonnell v. Mitchel[l]*, 301 F. Supp. 2d 698, 718-20 (N.D. Ohio 2004). His petition was denied on February 4, 2004 (*id.* at 765), and the Sixth Circuit affirmed that decision on January 8, 2007 (*Bonnell v. Mitchell*, 212 F. App'x. 517 (6th Cir. 2007)). The United

[2] After the briefing was complete, petitioner filed a request (Doc. No. 11) that the Court take notice of Ohio Supreme Court docket in *State v. Kirkland*, Case No. 2010-0854, which respondent opposed (Doc. No. 12). Bonnell also requested that the Court take notice of *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017). (Doc. No. 13.) Jenkins filed a response (Doc. No. 14), and Bonnell filed a reply (Doc. No. 15). The Court reviewed both requests, but concludes that they are not relevant to the Court's analysis of whether the instant petition is second or successive, and do not change the outcome of that analysis.

States Supreme Court denied Bonnell's petition for writ of certiorari on December 3, 2007. *Bonnell v. Ishee*, 552 U.S. 1064, 128 S. Ct. 710, 169 L. Ed. 558 (2007).

C. Bonnell's Second § 2254 Habeas Petition

Bonnell again seeks federal habeas relief in this Court. Petitioner contends that the two claims set forth in his second petition could not have been raised in his first habeas petition because those claims did not exist at the time of his first petition and, thus, were not ripe at that time. (*See* Pet. at 19-20.)

1. Claim based on *Hurst*

The first claim is grounded in *Hurst*, *supra*, wherein the United States Supreme Court held that Florida's capital sentencing scheme was unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." (Pet. at 27, quoting *Hurst*, 136 S. Ct. at 619.) Bonnell argues that *Hurst* is a "watershed procedural rule," and the first claim in his second petition did not ripen until the Ohio Supreme Court applied *Hurst* retroactively in *State v. Kirkland*, Case No. 1995-0042, Entry dated May 4, 2016, *rehearing denied* entry dated Nov. 9, 2016. (*Id*. at 18.) Bonnell claims that, under *Hurst*, two aspects of his

conviction and sentence are unconstitutional: (1) appellate reweighing of two merged murder counts;[3] and (2) appellate fact finding increasing his sentence from life in prison to death.[4]

2. Due process jurisdictional claim

For his second claim, petitioner asserts that the trial court never issued a lawful judgment pursuant to Ohio Criminal Rule 32(C) and, thus, the Ohio appellate courts never had jurisdiction over his appeals, violating his due process and equal protection rights. (Pet. at 36-38.) After Bonnell's first § 2254 habeas petition was concluded, the Ohio Supreme Court issued an opinion regarding the requirements of Rule 32(C), holding that a judgment of conviction "must include the

[3] Relevant to the instant petition, Bonnell argued on direct appeal that he was improperly sentenced by the trial court because it did not merge the two murder charges arising from a single homicide pursuant to Ohio's allied offense statute, Ohio Rev. Code § 2941.25, which prohibits conviction for two allied offenses of similar import. *State v. Bonnell*, No. 55927, 1989 WL 117828, at *14 (Ohio Ct. App. Oct. 5, 1989), *aff'd* 573 N.E.2d 1082 (1991). The appellate court agreed that the trial court erred, and merged the two murder counts. *Id*. The Ohio court of appeals concluded, however, that the trial court's failure to merge the two murder counts was a harmless procedural error. The Ohio Supreme Court agreed and found that the trial court's error was sufficiently corrected by the court of appeals' declaration that the two offenses were merged. *Bonnell*, 573 N.E.2d at 1086. As he argued in his state court appeals, Bonnell contends in the instant habeas petition that Ohio law requires the felony murder and aggravated murder charges in his case to be merged for sentencing, and requires that a jury arrive at an appropriate sentence by determining whether aggravating circumstances outweigh the mitigating factors in order to impose a sentence of death. Because the trial court did not merge the murder charges, he argues that both were improperly considered by the jury during the penalty phase. Bonnell reasons that, when the appellate court merged his two murder charges to correct the trial court's error, the appellate court improperly reweighed aggravating circumstances against mitigating factors, and unconstitutionally substituted its judgment for the judgment of the jury in violation of Ohio Rev. Code § 2929.03(D)(2) and *Hurst's* constitutional mandate. (Pet. at 26-33.)

[4] Under Ohio law, the imposition of the death penalty for aggravated murder is precluded unless at least one if the factors listed in Ohio Rev. Code § 2929.04(A) is specified in the indictment and proved beyond a reasonable doubt. On direct appeal, Bonnell argued that "the trial court erred by failing to instruct the jury that [Bonnell] must be found to be the principal offender of the aggravated murder offense in order for appellant to be found guilty of the R.C. 2929.04(A)(7) death penalty specification. Additionally, . . . because the verdict forms do not indicate that the jury found appellant to be the principal offender, the state failed to prove an essential element of its case." *Bonnell*, 573 N.E.2d at 1087. But the Ohio court of appeals and Ohio Supreme Court found no reversible error because "[t]he evidence in this case does not reasonably suggest that Bunner's murder was committed by more than one offender. . . . We conclude that, under these circumstances, any error in failing to instruct the jury on the principal offender issue was not outcome determinative." *Id*. In his petition, Bonnell argues that the appellate court's fact-finding on the issue of whether Bonnell was a principal offender cannot, under *Hurst*, be substituted for a proper jury determination of that issue beyond a reasonable doubt as required by Ohio law to be eligible for the death penalty. (Pet. at 33-35, citing *Bonnell*, 573 N.E.2d at 1090 (Brown, J., concurring in part and dissenting in part).)

sentence and the means of conviction, whether by plea, verdict, or finding by the court, to be a final appealable order under R.C. 2505.02." *State v. Baker*, 893 N.E.2d, 163, 167 (Ohio 2008).

After *Baker* was issued, Bonnell filed a motion with the trial court for resentencing and to issue a final appealable order because the trial court's judgment did not set forth his conviction for aggravated burglary and, therefore, was not a final appealable order under Ohio law. *See State v. Bonnell*, No. 96368, 2011 WL 5506071, at *1 (Ohio Ct. App. Nov. 10, 2011). The trial court denied the motion and Bonnell appealed. *Id*. The Ohio court of appeals agreed that the trial court's sentencing opinion and judgment entries did not comply with Rule 32(C) or *Baker*, but disagreed that the remedy was for the trial court to issue a new final appealable order so that Bonnell could again invoke jurisdiction to appeal his judgment of conviction. *Id*. at *2. Instead, the appellate court found that the trial court's technical failure to conform to Rule 32(C) "does not render the judgment a nullity[,]" and that the proper remedy was to issue a corrected nunc pro tunc entry. *Id*. at *3-4 (citing *State ex rel. DeWine v. Burge,* 943 N.E.2d 535, 539-40 (Ohio 2011)). Upon remand and as instructed by the appellate court, the trial court entered a nunc pro tunc judgment entry.[5] Against that background, Bonnell argues that his jurisdictional claim did not ripen until the trial court improperly added the fact of his burglary conviction in a nunc pro tunc order. (Opp'n at 81.)

D. Respondent's Motion to Transfer

Respondent contends that Bonnell's second-in-time § 2254 habeas petition is a "second or successive petition" under 28 U.S.C. § 2244(b) and, pursuant to 28 U.S.C. § 2244(b)(3) and § 1631, the Court must transfer the case to the Sixth Circuit for authorization to consider the petition.

[5] Bonnell challenged the nunc pro tunc entry on appeal, arguing that entry was illegal because a Rule 32 final appealable order had never been filed in the first instance. *State v. Bonnell*, No. 102630, 2015 WL 6797870, at *2 (Ohio Ct. App. Nov. 5, 2015) (*Bonnell* 2015). The court of appeals disagreed, *id*. at *5, and the Ohio Supreme Court declined to hear Bonnell's appeal. *State v. Bonnell*, 71 N.E.3d 297 (Table) (Ohio March 15, 2017).

Respondent argues that the trial court's nunc pro tunc entry is not a new judgment from which petitioner may seek relief, and the instant second-in-time petition attacks the same state court judgment as Bonnell's first petition. As to petitioner's claim based on *Hurst*, respondent maintains that *Hurst* does not present a new rule of constitutional law and, even if it did, the Sixth Circuit would still be required to authorize the petition. (Mot. at 69-70.) In response, Bonnell contends that the "second or successive" analysis of § 2244(b) does not apply to his instant petition because neither claim ripened until after Bonnell exhausted his first habeas proceeding and could not have been brought earlier. (*See* Opp'n at 78-81; *see also* Pet. at 20.)

II. DISCUSSION

A. Second Petitions for Habeas Corpus Relief

1. 28 U.S.C. § 2244(b)—"second or successive" habeas petitions

Under the gatekeeping provisions of 28 U.S.C. § 2244(b)(1), claims presented in a second or successive § 2254 habeas petition that were presented in a prior habeas petition must be dismissed. Even if claims in a second habeas petition were not presented in a prior petition, those claims "also must be dismissed unless they rely either on a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence." *Sneed v. Jenkins*, No. 5:17 CV 83, 2017 WL 564821, at *2 (N.D. Ohio Feb. 13, 2017) (citing 28 U.S.C. § 2244(b)(2)).

Section 2244(b)(3)(A) requires that before a second or successive petition is filed in the district court, "the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." A district court lacks jurisdiction to review a "second or successive" petition under § 2244(b) without authorization from the court of appeals. *In re Smith*, 690 F.3d 809, 809-10 (6th Cir. 2012) (citations omitted); *see also Moreland v. Robinson*,

813 F.3d 315, 322 (6th Cir. 2016) (district court lacks jurisdiction to review second or successive petitions for habeas corpus relief without permission from the Sixth Circuit) (citations omitted).

But when a petitioner does not file a motion with the court of appeals, the district court has jurisdiction to determine whether a second-in-time petition is a second or successive petition that requires authorization. *In re Smith*, 690 F.3d at 809-10. That determination is a threshold issue that must be resolved by the district court before it undertakes any analysis of the application pursuant to 28 U.S.C. § 2244(b)(1) or (2). If the district court determines that the second-in-time petition is a second or successive petition, then the district court must transfer the petition to the court of appeals pursuant to 28 U.S.C. § 1631 for authorization to further consider the petition. *Id.*; *Sneed*, 2017 WL 564821, at *2 (same) (citing *In re Smith,* 690 F.3d at 809). If the second-in-time petition is not second or successive, the district court may consider the petition pursuant to § 2244(b)(1) and (2) without authorization from the Sixth Circuit. *See In re Smith*, 690 F.3d at 810.

2. Unripe claims are not second or successive under § 2244(b)

Every second-in-time habeas petition is not a "second or successive" petition within the meaning of § 2244(b). *Storey v. Vasbinder*, 657 F.3d 372, 376 (6th Cir. 2011).

> The phrase ["second or successive"] is instead "a 'term of art' that is 'given substance' by the Supreme Court's habeas cases." *In re Salem,* 631 F.3d 809, 812 (6th Cir. 2011) (quoting *Slack v. McDaniel,* 529 U.S. 473, 486, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)). Accordingly, in a number of cases, the Court has held that an application was not second or successive even though the petitioner had filed an earlier one. In *Stewart v. Martinez-Villareal,* 523 U.S. 637, 118 S. Ct. 1618, 140 L. Ed. 2d 849 (1998), the petitioner filed a second petition that presented a claim identical to one that had been included in an earlier petition. The claim had been unripe when presented in the earlier petition. The Court treated the two petitions as "only one application for habeas relief[.]" *Id.* at 643, 118 S. Ct. 1618. In *Panetti v. Quarterman,* 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007), the Court held that an application that presented a claim that had *not* been presented in an earlier application, but that would have been unripe if it had been presented then, was not second or successive. *Id.* at 945, 127 S. Ct. 2842. In *Magwood v. Patterson,* [561 U.S. 320], 130 S. Ct. 2788, 177 L. Ed. 2d 592 (2010), the Court made clear that an application challenging an earlier criminal judgment did not

> count for purposes of determining whether a later application challenging a new judgment in the same case was second or successive. *Id.* at 2797–98.

Id. at 376-77.

In *Martinez-Villareal*, and later in *Panetti*, the Supreme Court held that the statutory bar on "second or successive" applications does not apply to claims raised under *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986) (prohibiting the execution of insane prisoners) filed after the state has obtained an execution warrant. That exception, based on the ripeness doctrine, permits a petitioner to file what is functionally a first petition as to a claim that ripens only when execution is imminent because an individual's competency to be executed cannot properly be assessed until that time. *See Martinez-Villareal*, 523 U.S. at 645 ("Respondent brought his claim in a timely fashion, and it has not been ripe for resolution until now."); *Panetti*, 551 U.S. at 945 ("We conclude, in accord with this precedent, that Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe."). Thus, a second-in-time petition may be "functionally a first petition as to a previously unripe claim[.]" *Sneed*, 2017 WL 564821, at *3 (citing *Martinez-Villareal*, 523 U.S. at 654 and *Panetti*, 551 U.S. at 945).

B. Analysis

Although the briefing on both sides strays into the merits of the petition and other matters, the issue before the Court is very narrow. That is, do the claims in petitioner's second-in-time petition require authorization from the Sixth Circuit to be considered further under § 2244(b). The Court concludes that both claims require authorization in order to proceed.

1. Claim based on *Hurst* is second or successive

Petitioner relies on the ripeness theory in *Panetti* and *Martinez-Villareal* to support his argument that the instant habeas petition is not successive and, therefore, not subject to § 2244(b)'s authorization requirement. (*See* Opp'n at 79-80.) Bonnell argues that his claim based on *Hurst* did not accrue until the Ohio Supreme Court retroactively applied *Hurst* to a capital case in *State v. Kirkland* (Case No. 1995-0042), a ruling that became final in November 2016. (*Id*. at 84.)

Courts have applied the *Panetti/Martinez-Villareal* ripeness exception to the statutory bar on successive habeas petitions outside the context of *Ford* claims. In *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010), for example, the Sixth Circuit found that a claim asserted in a second habeas petition was not successive because it challenged the cumulative effect of amendments to Michigan's parole system, the last of which took effect two years after the petitioner filed his original habeas petition.[6] *Id*. at 605-606 (collecting cases); *see also Leal Garcia v. Quarterman*, 573 F.3d 214, 222 (5th Cir. 2009) ("[L]ater habeas petitions attacking distinct judgments, administration of an inmate's sentence, a defective habeas proceeding itself, or some other species of legal error–when the error arises after the underlying conviction–tend to be deemed non-successive.") (footnotes omitted) (collecting cases); *Phillips v. Robinson*, No. 5:12cv2323, 2013 WL 3990756, at *11 (N.D. Ohio Aug. 2, 2013) (holding petitioner's second habeas petition was not successive because his method-of-execution claim was based on Ohio's new execution protocol adopted after his original federal habeas proceedings).

[6] The Sixth Circuit concluded that Jones' jury selection claim, however, was not an exception to the ripeness doctrine because it challenged events that occurred at his trial and, thus, was squarely within the scope of § 2244(b). *In re Jones*, 652 F.3d at 606.

Bonnell does not argue that events occurring after his first petition make the claims in the second petition functionally a first petition because they were not ripe at the time of his earlier petition. Rather, petitioner contends that *Hurst* represents a change in the law that, retroactively applied, rendered his conviction and sentence unconstitutional.[7]

But courts generally have refused to apply the *Panetti/Martinez-Villareal* ripeness exception to second petitions asserting claims based on a change in the law. *See Sneed*, 2017 WL 564821, at *3-4 ("Moreover, Petitioner cannot rely on *Panetti's* and *Martinez-Villareal's* ripeness theory [with respect to his *Hurst* claim]. The *Ford* claims at issue in those cases were based on the petitioners' mental condition, involving facts that can change significantly over time and, therefore, became ripe only close to execution when those facts could properly be assessed. Here, Petitioner argues his new claims just became ripe not because of new facts—the claims relate to his state-court trial and appeals—but because of a 'clarification' of a legal rule that was established many years ago. This extends *Panetti* and *Martinez-Villareal* too far."); *see also Fears v. Jenkins*, No. 2:17-CV-029, 2017 WL 1177609, at *3 (S.D. Ohio Mar. 30, 2017) ("Fears' claims under *Hurst* do not escape the second-or-successive classifications [under the ripeness doctrine] by being based on newly-arising facts as in *Panetti*[.]"); *Sheppard v. Warden, Pickaway Corr. Inst.*, No. 1:15-cv-543, 2016 WL 4471679, at *4 (S.D. Ohio Feb. 5, 2016) ("[C]ourts have uniformly concluded that claims based on a subsequent change in the law do not pose ripeness concerns and instead require authorization from the circuit courts before they may be raised in a second federal habeas petition."); *United States v. Claycomb*, 577 F. App'x. 804, 805 (10th Cir. 2014) ("[W]hat makes a claim unripe is that the factual predicate has not matured, not that the law was unsettled.");

[7] Bonnell contends that *Hurst* represents both a substantive and procedural change in the law. (*See* Opp'n at 84 and Pet. at 18.)

Johnson v. Wynder, 408 F. App'x. 616, 619 (3d Cir. 2010) (finding later habeas petition alleging an actual innocence claim based on a change in state law, which the petitioner argued should be applied retroactively to him, was a "second or successive" petition); *Lucero v. Cullen*, No. 2:12cv0957-MCE-EFB P, 2014 WL 4546055, at *9 (E.D. Cal. Sept. 12, 2014) (holding that, in light of the "compelling evidence" provided by "the statutory language of § 2244," petitioner's second-in-time federal habeas petition raising a claim based on an intervening change in state law was successive).

One reason that a change in the law does not trigger the ripeness exception that renders a second-in-time petition non-successive may be found in the language of § 2244(b)(2) itself. Section 2244(b)(2)(A) provides that claims presented in "second and successive" petitions that rely on new and retroactive rules of constitutional law require authorization, demonstrating that such claims, while previously unavailable to the petitioner, are nonetheless successive. The Fifth Circuit addressed this issue in *Leal Garcia*, explaining that:

> [the petitioner asks] us to hold that a petition is non-successive if it rests on a rule of constitutional law decided after the petitioner's first habeas proceedings because such a claim would not have been previously available. . . . Newly available claims based on new rules of constitutional law (made retroactive by the Supreme Court) are *successive* under § 2244(b)(2)(A): Indeed, this is the reason why authorization is needed to obtain review of a successive petition. [The petitioner's argument] would permit an end-run around § 2244. The new rule of constitutional law would be non-successive because it was previously unavailable, so no authorization would be required. Were [the petitioner] correct, § 2244(b)(2) would be rendered surplusage.

Leal Garcia, 573 F.3d at 221 (emphasis original, footnote omitted). The Fifth Circuit observed that it is the "repeated attacks on an underlying judgment," which "often take on new forms as the legal landscape shifts, that are evil against which AEDPA is directed[.]" *Id*. at 222. In determining whether a later petition is successive or not, the court concluded, courts must "consider the defect

that the later petition attacks and when that defect arose." *Id*. at 224 (petitioner's second habeas petition was not successive, because it did not "rely on some novel legal basis to again attack his conviction," but instead "allege[d] a defect that arose . . . after his conviction[.]") (footnote omitted).

Bonnell's first claim is successive. This claim based on *Hurst* challenges the same judgment of conviction and sentence that he challenged in his prior petition, and does not attack a defect that arose after his first petition was decided and denied. Rather, he seeks to use "a novel legal basis to again attack his conviction . . . ." *See Leal Garcia*, 573 F.3d at 224. The *Panetti/Martinez-Villareal* ripeness exception to the bar on successive petitions does not apply to claims relying on changes in the law. It is for the Sixth Circuit to now determine whether Bonnell may proceed with this claim under § 2244(b)(2)(A).

2. Due process jurisdictional claim is second or successive

Petitioner's jurisdictional claim states that his equal protection and due process rights were violated because the state trial court failed to issue a final, appealable order in the judgment of conviction. (Pet. at 36-38.) Bonnell contends that the jurisdictional defect claim is not successive because it did not become ripe until January 20, 2015, when the trial court issued the nunc pro tunc entry revising the original judgment of conviction to include his conviction for aggravated burglary which, Bonnell argues, violated *State v. Lester*, 958 N.E.2d 142 (Ohio 2011). Citing *Lester*, petitioner asserts that "Ohio law does not permit a nunc pro tunc entry to cure jurisdictional errors of this magnitude." (Opp'n. at 83.)[8]

[8] Bonnell exhausted this claim in state-court post-conviction proceedings that ended on March 15, 2017. *State v. Bonnell*, 148 Ohio St. 3d 1425 (Ohio 2017).

The *Panetti/Martinez-Villareal* ripeness exception does not apply to this claim because the claim has been available to petitioner from the time of his conviction and sentence in 1988, and *Lester* does not support petitioner's ripeness argument. The "jurisdictional error" of which petitioner complains lies in the trial court's failure to state his conviction for aggravated burglary in the initial judgment of conviction, which petitioner argues was not a final appealable order in the first instance and cannot be corrected by a nunc pro tunc entry. As Bonnell notes, "it is undisputed that the fact of a conviction was not included in the journal entry, sentencing opinion or oral pronouncement of sentence." (*Id*. at 82.)

But at the time of Bonnell's conviction, Rule 32(C) provided that a "judgment of conviction shall set forth the plea, the verdict, or findings upon which each conviction is based, and the sentence." *Bonnell*, 2011 WL 5506071, at *4 (quoting Rule 32(C)).[9] The Ohio Supreme Court stated that this Rule 32(C) language

> clearly specifies the substantive requirements that must be included within a judgment entry of conviction to make it final for purposes of appeal and that the rule states that those requirements "shall" be included in the judgment entry of conviction. These requirements are the *fact* of the conviction, the sentence, the judge's signature, and the entry on the journal by the clerk. All of these requirements relate to the essence of the act of entering a judgment of conviction and are a matter of substance, and their inclusion in the judgment entry of conviction is therefore required. Without these substantive provisions, the judgment entry of conviction cannot be a final order subject to appeal under R.C. 2505.02. A judgment entry of conviction that includes the substantive provisions places a defendant on notice that a final judgment has been entered and the time for the filing of any appeal has begun.

Lester, 958 N.E.2d at 146-47 (emphasis in the original).

[9] Rule 32(C), amended effective July 1, 2013, now states in pertinent part: "A judgment of conviction shall set forth the fact of conviction and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. . . ." Ohio R. Crim. P. 32(C).

The language of Rule 32(C) in effect at the time Bonnell's judgment was originally entered by the trial court "clearly specifies" that the fact of conviction must be included in a judgment entry. *Id.* at 146 ("In *State v. Baker,* we confirmed that a judgment entry of conviction must contain the Crim. R. 32(C) elements to be final and subject to appeal[.]"). Thus, Bonnell's due process claim that his judgment of conviction was defective because it failed to include the burglary conviction as required by Rule 32(C) was available to him when the original judgment was entered in 1988.[10] Bonnell's argument that Ohio law does not permit a nunc pro tunc entry to cure such a defect, which he claims ripened in 2015, is beside the point.

Moreover, the omission of the fact of conviction was not the issue before the Ohio Supreme Court in either *Baker* or *Lester*.[11] *Baker* and *Lester* concerned the manner of conviction, the effect of excluding the manner of conviction on the finality of the judgment, and the effect of a nunc pro tunc entry to correct the omission of the manner of conviction in a judgment—issues that have no bearing on Bonnell's claim. Those cases did not change the law regarding Rule 32(C)'s requirement at the time of petitioner's conviction (and at all times relevant here) that a trial court's judgment entry must include the *fact* of each conviction in the judgment entry of conviction. Although Bonnell's claim that his judgment of conviction did not comply with Rule 32(C) was available to him at the time of his conviction in 1988, he asserts that claim for the first

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[10] "[T]he purpose of Crim. R. 32(C) is to ensure that a defendant is on notice concerning when a final judgment has been entered and the time for filing an appeal has begun to run." *Lester*, 958 N.E.2d at 146-47 (citing *State v. Tripodo*, 363 N.E.2d 719 (Ohio 1977); App. R. 4(A)). Although a separate issue from the Court's analysis of whether this claim is second or successive, the Ohio Court of Appeals noted that Bonnell had notice of his burglary conviction and exhausted his appeals. *Bonnell*, 2011 WL 5506081, at *3.

[11] In *Baker*, the Ohio Supreme Court addressed the question of "whether the term 'the plea' in Crim R. 32(C) means a plea entered by the defendant at arraignment or a plea that is the basis of a conviction." *Id.* at 147 ("Our specific holding was that the term 'the plea' in Crim.R. 32(C) means a plea of guilty upon which the court bases the conviction and not the plea at arraignment that is not a basis for the defendant's conviction.") (citing *Baker*, 893 N.E.2d at 167). The Ohio Supreme Court recognized in *Lester* that *Baker* had "created confusion and generated litigation regarding whether a trial court's inadvertent omission of a defendant's 'manner of conviction' affects the finality of a judgment entry of conviction." *Id.* at 146.

time now in a second petition. Thus, this claim is also successive and must be transferred to the Sixth Circuit for authorization to proceed.

III. CONCLUSION

For all of the foregoing reasons, the Court finds that both claims in Bonnell's Petition for Writ of Habeas Corpus are "second or successive," and require authorization from the Sixth Circuit pursuant to AEDPA's § 2244(b)(3)(A). Respondent's motion to transfer is granted. The Clerk is hereby ordered to transfer the case to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 for a determination as to whether Bonnell may proceed with the claims in his second successive petition for a writ of habeas corpus pursuant to § 2254.

IT IS SO ORDERED.

Dated: August 25, 2017

HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE

State v. Bonnell

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

November 10, 2011, Released and Journalized

No. 96368

Reporter
2011-Ohio-5837 *; 2011 Ohio App. LEXIS 4744 **; 2011 WL 5506071

STATE OF OHIO, PLAINTIFF-APPELLEE vs. MELVIN BONNELL, DEFENDANT-APPELLANT

Subsequent History: Discretionary appeal not allowed by State v. Bonnell, 138 Ohio St. 3d 1493, 2014-Ohio-2021, 2014 Ohio LEXIS 1054, 8 N.E.3d 963 (May 14, 2014)

Decision reached on appeal by, Dismissed by State v. Bonnell, 2015-Ohio-4590, 2015 Ohio App. LEXIS 4555 (Ohio Ct. App., Cuyahoga County, Nov. 5, 2015)

Prior History: [**1] Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-223820.

State v. Bonnell, 1989 Ohio App. LEXIS 4982 (Ohio Ct. App., Cuyahoga County, Oct. 5, 1989)

Disposition: REVERSED AND REMANDED.

Counsel: FOR APPELLANT: Timothy Young, Ohio Public Defender, Kimberly S. Rigby, Andrew J. King, Assistant Ohio Public Defenders, Columbus, OH; Laurence E. Komp, Manchester, MO.

FOR APPELLEE: William D. Mason, Cuyahoga County Prosecutor, Matthew E. Meyer, Assistant Prosecuting Attorney, Cleveland, OH.

Judges: BEFORE: S. Gallagher, J., Stewart, P.J., and Rocco, J.

Opinion by: SEAN C. GALLAGHER

Opinion

JOURNAL ENTRY AND OPINION

SEAN C. GALLAGHER, J.:

[*P1] Appellant Melvin Bonnell appeals the decision of the Cuyahoga County Court of Common Pleas that denied his motion for resentencing and to issue a final, appealable order. For the reasons stated herein, we reverse the decision and remand the matter to the trial court for the issuance of a nunc pro tunc entry consistent with this opinion.

[*P2] In 1988, Bonnell was convicted by a jury on two counts of aggravated murder and one count of aggravated burglary. He was sentenced to death for the aggravated murders, and the court imposed a sentence of 10 to 25 years in prison for the aggravated burglary. Appellant pursued his appeal avenues in state and federal courts, largely to no avail. Of [**2] relevance to this matter, in *State v. Bonnell* (Oct. 5, 1989), Cuyahoga App. No. 55927, 1989 Ohio App. LEXIS 4982, this court merged the two separate murder counts and found that because the sentence for aggravated burglary was imposed outside of Bonnell's presence, he was to be resentenced on said count. Bonnell was resentenced to the same prison term on the aggravated burglary count on October 25, 1989. On May 21, 2010, 22 years after his conviction and sentence were initially imposed, Bonnell filed a "motion for resentencing and to issue a final appealable order." The trial court denied the motion, and this appeal followed.

[*P3] Bonnell's sole assignment of error is as follows: "The trial court erred by not granting Bonnell's motion to vacate because the purported judgment of conviction does not comply with Crim.R. 32(C) and *State v. Baker* [119 Ohio St.3d 197, 2008 Ohio 3330, 893 N.E.2d 163]."

[*P4] Bonnell argues that the sentencing opinion and judgment entries fail to set forth the conviction on the aggravated burglary count. Therefore, he claims that there is no final, appealable order and that the matter should be remanded to the trial court for resentencing and the issuance of a judgment in compliance with Crim.R. 32(C).

[*P5] [**3] Crim.R. 32(C) provides that a "judgment of conviction shall set forth the plea, the verdict, or findings upon which each conviction is based, and the sentence." In *Baker*, the Ohio Supreme Court expounded on the language of Crim.R. 32(C) and set forth the elements required for a judgment of conviction to constitute a final appealable order. Id. at ¶ 18. The

court concluded that a judgment of conviction "must include the sentence and the means of conviction, whether by plea, verdict, or finding by the court, to be a final appealable order under R.C. 2505.02." Id. at ¶ 19. The Ohio Supreme Court's decision created confusion and spawned numerous appeals.

[*P6] In *State v. Lester*, __ Ohio St.3d __, 2011 Ohio 5204, __ N.E.2d __, ¶ 9, the Ohio Supreme Court recognized that its decision in *Baker* "created confusion and generated litigation regarding whether a trial court's inadvertent omission of a defendant's 'manner of conviction' affects the finality of a judgment entry of conviction." The court found that "the finality of a judgment entry of conviction is not affected by a trial court's failure to include a provision that indicates the manner by which the conviction was effected, because [**4] that language is required by Crim.R. 32(C) only as a matter of form, provided the entry includes all the substantive provisions of Crim.R. 32(C)." Id. at ¶ 12. Nevertheless, the court held that when the manner of conviction is not included, the defendant remains entitled to a correction to the judgment. Id. at ¶ 16. [1] As to the substantive requirements of Crim.R. 32(C), the court held as follows: "[A] judgment of conviction is a final order subject to appeal under R.C. 2505.02 when the judgment entry sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk." Id. at ¶ 14. [2]

[*P7] This was a death penalty case in which the trial court issued a separate sentencing opinion as required by R.C. 2929.03(F). In *State v. Ketterer*, the Ohio Supreme Court held that in cases in which the death penalty is imposed, the final, appealable order consists of both the sentencing opinion filed pursuant to R.C. 2929.03(F) and the judgment of conviction filed pursuant to Crim.R. 32(C). 126 Ohio St.3d 448, 2010 Ohio 3831, 935 N.E.2d 9. So long as the requisite elements are in those two orders, a final, appealable order is present.

[*P8] The sentencing opinion filed May 27, 1988, states that Bonnell was indicted on December 30, 1987, with charges on "numerous felony counts and two counts of aggravated murder with specifications." The opinion proceeds to state as follows: "On March 3, 1988 the jury found the defendant guilty in the guilt phase of this capital murder case, and on March 22, 1988 the jury found proof beyond a reasonable doubt that the aggravating circumstances which defendant was found guilty of committing did outweigh the mitigating factors in the case. Subsequently the Court accepted and followed the recommendation of the jury in making [**6] a similar finding and sentenced the defendant to death in the electric chair." After setting forth various findings, the sentencing opinion pronounces "[o]n both counts of aggravated murder with specification, the defendant is sentenced to death in the electric chair."

[*P9] In the nunc pro tunc sentencing entry filed May 27, 1988, the court indicated "[t]he court concurs with the jury finding of the death penalty." The court proceeded to order his execution. The court also sentenced Bonnell to a term of 10 to 25 years on Count 1, aggravated burglary. Subsequent to an appeal, the trial court issued a sentencing entry filed October 20, 1989, which resentenced Bonnell to the same term on the aggravated burglary count. The judge signed and the clerk of court certified each of the three documents.

[*P10] Bonnell argues that the sentencing opinion and entries fail to properly journalize the aggravated burglary conviction and the related finding of guilt on that count. He states the sentencing opinion only addresses the conviction for aggravated murder and only references that he was indicted on "numerous felony counts," with no specification as to the nature of those charges. We agree.

[*P11] Our review reflects [**7] that the fact of conviction was only discussed in relation to the aggravated murder counts. The aggravated burglary count is not specifically mentioned in the sentencing opinion, and neither the fact nor the manner of conviction was indicated on that count. As a result, the trial court failed to technically comply with Crim.R. 32(C).

[*P12] However, we do not agree with the remedy requested by Bonnell. Bonnell claims he is entitled to have the trial court issue a final, appealable order, so as to enable him to again invoke jurisdiction to appeal his

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[1] As recognized by Justice O'Donnell, the court has once again added confusing and unnecessary language and complicated the problem. Id. at ¶ 32, O'Donnell, J., concurring in part and dissenting in part. Nonetheless, we are bound to follow the decision.

[2] Insofar as the Ohio Supreme Court held in *Lester* that a defendant who has exhausted his appeals remains entitled to a correction of the judgment entry where Crim.R. 32(C) is not complied with, we reject the state's argument that Bonnell's motion amounts to an untimely [**5] petition for postconviction relief.

judgment of conviction. We are not persuaded by his argument.

[*P13] The Ohio Supreme Court has found that the technical failure to conform to Crim.R. 32(C) does not render the judgment a nullity. *State ex rel. DeWine v. Burge*, 128 Ohio St.3d 236, 2011 Ohio 235, 943 N.E.2d 535, at ¶ 19. In *State ex rel. DeWine*, the court held that the remedy for correcting a sentencing entry that does not comply with Crim.R. 32(C) is to issue a corrected sentencing entry. Id. at ¶ 23. As expressed by the court:

> **"Consistent with the treatment of Crim.R. 32(C) errors as clerical mistakes that can be remedied by a nunc pro tunc entry, we have expressly held that 'the remedy** [**8] **for a failure to comply with Crim.R. 32(C) is a revised sentencing entry rather than a new hearing.' *State ex rel. Alicea v. Krichbaum*, 126 Ohio St.3d 194, 2010 Ohio 3234, 931 N.E.2d 1079, ¶ 2; see also *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008 Ohio 4609, 895 N.E.2d 805, ¶ 10-11 (a defendant is entitled to a sentencing entry that complies with Crim.R. 32(C)); *Dunn v. Smith*, 119 Ohio St.3d 364, 2008 Ohio 4565, 894 N.E.2d 312, ¶ 10 (when a trial court fails to comply with Crim.R. 32(C), 'the appropriate remedy is correcting the journal entry').**
>
> **"This result is logical. The trial court and the parties all proceeded under the presumption that the sentencing entry for Smith constituted a final, appealable order. Any failure to comply with Crim.R. 32(C) was a mere oversight that vested the trial court with specific, limited jurisdiction to issue a new sentencing entry to reflect what the court had previously ruled and not to issue a new sentencing order reflecting what, in a successive judge's opinion, the court should have ruled. These circumstances are thus distinguishable from egregious defects, such as an entry that is not journalized, that permit** [**9] **a court to vacate its previous orders. Cf. *State ex rel. White v. Junkin* (1997), 80 Ohio St.3d 335, 337-338, 1997 Ohio 340, 686 N.E.2d 267. Moreover, the technical failure to comply with Crim.R. 32(C) by not including the manner of conviction in Smith's sentence is not a violation of a statutorily mandated term, so it does not render the judgment a nullity. Cf. *State v. Bezak*, 114 Ohio St.3d 94, 2007 Ohio 3250, 868 N.E.2d 961, ¶ 10-12, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268, 39 O.O.2d 414, 227 N.E.2d 223; see also *State v. Fischer*, 128 Ohio St.3d 92, 2010 Ohio 6238, 942 N.E.2d 332, ¶ 39 ('fact that the sentence was illegal does not deprive the appellate court of jurisdiction to consider and correct the error')."**

Id. at ¶ 18-19.

[*P14] Likewise, in *Lester*, the court determined that "a nunc pro tunc judgment entry issued for the sole purpose of complying with Crim.R. 32(C) to correct a clerical omission in a final judgment entry is not a new final order from which a new appeal may be taken." Id. at ¶ 20. While in *Lester* the court found that the "fact of conviction" must be included in the judgment entry of conviction, the court set forth this requirement with the understanding that "the [**10] purpose of Crim.R. 32(C) is to ensure that a defendant is on notice concerning when a final judgment has been entered and the time for filing an appeal has begun to run." *Lester*, at ¶ 20, citing *State v. Tripodo* (1977), 50 Ohio St.2d 124, 127, 363 N.E.2d 719; App.R. 4(A). Like the defendant in *Lester*, Bonnell had notice of his conviction, which was evident throughout the record, and was apparent to the defendant who had exhausted the appellate process. See id. at ¶13.

[*P15] Similarly, in *State v. Fischer*, the Ohio Supreme Court rejected the notion that a defendant could raise any and all errors relating to his conviction when his original sentence was deemed void for the failure to include postrelease control and he had already appealed his conviction. 128 Ohio St.3d 92, 2010 Ohio 6238, 942 N.E.2d 332. Instead, the court limited the scope of relief to correcting only the illegal sentence and found res judicata still applied to other aspects of the merits of the conviction. Id. See, also, *State v. Wilson*, 129 Ohio St.3d 214, 2011 Ohio 2669, 951 N.E.2d 381 [**11] (applying law of the case and res judicata to convictions and unaffected sentences upon remand for an allied- offenses sentencing error).

[*P16] Additionally, Ohio appellate courts have found that where a trial court issues a corrected judgment entry to comply with Crim.R. 32(C), a defendant who has already had the benefit of a direct appeal cannot raise any and all claims of error in successive appeals. *State v. Triplett*, Lucas App. No. L-10-1158, 2011 Ohio 1713; *State v. Avery*, Union App. No. 14-10-35, 2011 Ohio 4182, ¶ 14; *State v. Harris*, Richland App. No. 10-CA-49, 2011 Ohio 1626, ¶ 30. In such circumstances, res judicata remains applicable and the defendant is not entitled to a "second bite at the apple." *Avery*, at ¶ 14.

Aptly stated, "[n]either the Constitution nor common sense commands anything more." *Fischer*, 128 Ohio St.3d 92, at ¶ 26. As argued by the state herein, to hold otherwise would open the floodgates and "enable validly convicted and sentenced prisoners throughout the state to circumvent res judicata by arguing, after all direct and collateral appeals are exhausted, that their sentencing documents are improperly worded[.]"

[*P17] In this case, all parties were aware that Bonnell [**12] was convicted by a jury on the aggravated burglary charge for which he was sentenced, as evidenced by his appeal of that charge. Further, the reviewing courts exercised jurisdiction over his appeals, and heard and decided his case. Thus, unlike the defendant in *Baker*, Bonnell was not deprived the opportunity to appeal his conviction. Rather, Bonnell was given full opportunity to litigate all of the issues relating to his conviction and sentence, and his substantive rights were not prejudiced in any way.

[*P18] Accordingly, we conclude that the proper remedy is for the trial court to issue a nunc pro tunc entry that includes the fact and manner of conviction on the aggravated burglary charge. As no new or substantial right is affected under R.C. 2505.02(A)(1) by the correction, and appellant has already exhausted the appellate process, the corrected judgment entry is not a new final order from which a new appeal may be taken.

Judgment reversed; case remanded with instructions.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas [**13] court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

MELODY J. STEWART, P.J., and KENNETH A. ROCCO, J., CONCUR

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State v. Bonnell

Supreme Court of Ohio

May 14, 2014, Decided

2011-2164.

Reporter
2014 Ohio LEXIS 1054 *; 138 Ohio St. 3d 1493; 2014-Ohio-2021; 8 N.E.3d 963; 2014 WL 1924627

State v. Bonnell.

Notice: DECISION WITHOUT PUBLISHED OPINION

Subsequent History: Reconsideration denied by State v. Bonnell, 140 Ohio St. 3d 1442, 2014-Ohio-4160, 2014 Ohio LEXIS 2478, 16 N.E.3d 684 (Sept. 24, 2014)

Prior History: [*1] Cuyahoga App. No. 96368, 2011-Ohio-5837.

State v. Bonnell, 2011-Ohio-5837, 2011 Ohio App. LEXIS 4744 (Ohio Ct. App., Cuyahoga County, Nov. 10, 2011)

Judges: Lanzinger and O'Neill, JJ., dissent.

Opinion

APPEAL NOT ACCEPTED FOR REVIEW

Lanzinger and O'Neill, JJ., dissent.

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87528232

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

STATE OF OHIO
Plaintiff

2015 JAN 20 P 2:38

WINDOW 8
CLERK OF COURTS
CUYAHOGA COUNTY

MELVIN BONNELL
Defendant

Case No: CR-87-223820-ZA

Judge: TIMOTHY MCCORMICK

INDICT: 2911.11 AGGRAVATED BURGLARY WITH SPECIFICATIONS
2903.01 AGGRAVATED MURDER WITH VIOLENCE SPECIFICATION
2903.01 AGGRAVATED MURDER WITH VIOLENCE SPECIFICATION
ADDITIONAL COUNTS...

JOURNAL ENTRY

NUNC PRO TUNC ENTRY AS OF AND FOR 10/30/1989.
THE 8TH DISTRICT COURT OF APPEALS HAS REMANDED THIS MATTER HELD "TO ISSUE A NUNC PRO TUNC ENTRY THAT INCLUDES THE FACT AND MANNER OF CONVICTION ON THE AGGRAVATED BURGLARY CHARGE." STATE V. BONNELL, 8TH DISTRICT CUYAHOGA NO. 96368, 2011-OHIO-5837, 17. THEREFORE, THE COURT HEREBY ISSUES THE FOLLOWING NUNC PRO TUNC SENTENCING JOURNAL ENTRY (AS OF AND FOR 10-30-89) WHICH INCORPORATES DEFENDANT'S SENTENCE ON MULTIPLE COUNTS INTO A SINGLE ENTRY OF CONVICTION:

THIS COURT HEREBY ISSUES THE FOLLOWING NUNC PRO TUNC SENTENCING ENTRY PURSUANT TO THE ORDER OF THE 8TH DISTRICT COURT OF APPEALS IN STATE V. BONNELL, CA 96368.

ON MARCH 3, 1988 A JURY FOUND DEFENDANT GUILTY OF THE FOLLOWING: COUNT 1 AGGRAVATED BURGLARY IN VIOLATION OF RC 2911.11 WITH SPECIFICATIONS; COUNT 2 AGGRAVATED MURDER IN VIOLATION OF RC 2903.01(A) WITH SPECIFICATIONS AND WITH FELONY MURDER SPECIFICATION; AND COUNT 3 AGGRAVATED MURDER IN VIOLATION OF RC 2903.01(B) WITH SPECIFICATIONS AND WITH THE FELONY MURDER SPECIFICATION. COUNT 4 HAVING WEAPON WHILE UNDER DISABILITY WAS DISMISSED BY THE STATE FOR GOOD CAUSE SHOWN. THE MATTER THEN PROCEEDED TO A PENALTY PHASE AND THE JURY VOTED FOR A SENTENCE OF DEATH FOR THE TWO COUNTS OF AGGRAVATED MURDER. ON MARCH 29, 1988, THIS COURT ACCEPTED THE JURY'S RECOMMENDATION AND IMPOSED A SENTENCE OF DEATH. ON OR ABOUT MAY 27, 1988 THIS COURT ISSUED ITS OPINION PURSUANT TO RC 2929.03(F). THE COURT ALSO SENTENCED DEFENDANT TO PRISON FOR 10 TO 25 YEARS FOR THE AGGRAVATED BURGLARY. THE 8TH DISTRICT COURT OF APPEALS (CA-55927) FOUND THAT THIS COURT'S SENTENCE FOR THE AGGRAVATED BURGLARY WAS MADE OUTSIDE DEFENDANT'S PRESENCE AND ORDERED RESENTENCING. THE 8TH DISTRICT ALSO MERGED THE TWO COUNTS OF AGGRAVATED MURDER. ON OCTOBER 25, 1989, THIS COURT RESENTENCED DEFENDANT, WHO STANDS PREVIOUSLY CONVICTED OF AGGRAVATED BURGLARY TO PRISON FOR A TERM OF 10 YEARS TO 25 YEARS TO BE SERVED CONCURRENTLY WITH THE SENTENCE IN OTHER COUNTS.

THEREFORE, DEFENDANT MELVIN BONNELL IS HEREBY SENTENCED TO A PRISON TERM OF 10 YEARS TO 25 YEARS IN PRISON FOR COUNT 1 AGGRAVATED BURGLARY. COUNTS 2 AND 3 ARE MERGED PURSUANT TO STATE V. BONNELL, CA 96368. THE COURT MERGES COUNT 3 INTO COUNT 2. THE JURY FOUND A SENTENCE OF DEATH WAS APPOPRIATE WHICH THE COURT ACCEPTS. DEFENDANT MELVIN BONNELL IS SENTENCED TO DEATH ON COUNT 2 OF THE INDICTMENT. DEFENDANT'S SENTENCE IN COUNT 1 IS TO RUN CONCURRENT WITH HIS SENTENCE IN COUNT 2. MELVIN BONNELL IS ORDERED TO BE DELIVERED TO THE WARDEN OF CHILLICOTHE CORRECTIONAL INSTITUTION AND THEN TO THE WARDEN OF THE SOUTHERN OHIO CORRECTIONAL FACILITY WHERE DEFENDANT SHALL BE EXECUTED ON 8-8-88, PURSUANT TO APPLICABLE LAW. DEFENDANT ORDERED TO PAY COURT COSTS. IT IS FURTHER ORDERED THAT THE CLERK OF COURTS FORWARD CERTIFIED COPIES OF THIS ENTRY ALONG WITH A COPY OF THE COURT OF APPEALS JOURNAL ENTRY TO THE INSTITUTION THAT SAID

HEAR
01/15/2015


87528232

DEFENDANT WAS SENTENCED TO.
CLERK ORDERED TO SEND A COPY OF THIS ORDER TO:
KIMBERLY RIGBY AND ANDREW KING;
ASSISANT STATE PUBLIC DEFENDER
OFFICE OF THE PUBLIC DEFENDER
250 EAST BROAD STREET, SUITE 1400
COLUMBUS OH 43215

LAURENCE KOMP, ESQ.
P.O. BOX 1785
MANCHESTER MO 63011

KATHERINE MULLIN
ASSISTANT PROSECUTING ATTORNEY
CUYAHOGA COUNTY PROSECUTOR'S OFFICE
1200 ONTARIO STREET
JUSTICE CENTER - 8TH FLOOR
CLEVELAND OH 44113

01/15/2015
CPEFF 01/16/2015 09:31:10

Judge Signature

1/20/15
Date

1. ODRC
2. CCI - #204019

HEAR
01/15/2015

State v. Bonnell

Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County

November 5, 2015, Released; November 5, 2015, Journalized

No. 102630

Reporter
2015-Ohio-4590 *; 2015 Ohio App. LEXIS 4555 **; 2015 WL 6797870

STATE OF OHIO, PLAINTIFF-APPELLEE vs. MELVIN BONNELL, DEFENDANT-APPELLANT

Subsequent History: Later proceeding at State v. Bonnell, 147 Ohio St. 3d 1510, 2017-Ohio-304, 2017 Ohio LEXIS 162, 68 N.E.3d 817 (Jan. 27, 2017)

Motion granted by State v. Bonnell, 148 Ohio St. 3d 1413, 2017-Ohio-644, 2017 Ohio LEXIS 361, 69 N.E.3d 752 (Feb. 23, 2017)

Discretionary appeal not allowed by State v. Bonnell, 148 Ohio St. 3d 1425, 2017-Ohio-905, 2017 Ohio LEXIS 433, 71 N.E.3d 297 (Mar. 15, 2017)

Prior History: [**1] Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-87-223820-A.

State v. Bonnell, 2011-Ohio-5837, 2011 Ohio App. LEXIS 4744 (Ohio Ct. App., Cuyahoga County, Nov. 10, 2011)

Disposition: DISMISSED.

Counsel: FOR APPELLANT: Timothy Young, State Public Defender, By: Kimberly S. Rigby, Assistant State Public Defender, Columbus, Ohio; Laurence E. Komp, Manchester, Missouri.

FOR APPELLEE: Timothy J. McGinty, Cuyahoga County Prosecutor, By: Anthony Thomas Miranda, Matthew E. Meyer, T. Allan Regas, Assistant County Prosecutors, Cleveland, Ohio.

Judges: BEFORE: Laster Mays, J., Jones, P.J., and E.A. Gallagher, J. LARRY A. JONES, SR., P.J., and EILEEN A. GALLAGHER, J., CONCUR.

Opinion by: ANITA LASTER MAYS

Opinion

JOURNAL ENTRY AND OPINION

ANITA LASTER MAYS, J.:

[*P1] Defendant-appellant Melvin Bonnell ("Bonnell") appeals the trial court's entry of a "nunc pro tunc" judgment entered for the purpose of curing noncompliance with Crim.R. 32, subsequent to this court's remand to effect correction in *State v. Bonnell*, 8th Dist. Cuyahoga No. 96368, 2011-Ohio-5837 ("*Bonnell 2011*"). Bonnell asserts that, as a result, no final appealable order has ever been entered in this case. We disagree.

I. BACKGROUND AND HISTORY

[*P2] Bonnell was convicted in 1988 of two counts of aggravated murder (R.C. 2903.01) of Eugene Bunner with felony murder and firearms specifications and one count of aggravated burglary with firearm and aggravated felony [**2] specifications (R.C. 2911.11). The trial court imposed a death sentence pursuant to R.C. 2929.03(F) as well as a 10-to-25 year sentence for the aggravated burglary.

[*P3] A series of state and federal appellate filings followed. Extracting the procedural history pertinent to this appeal:

> [I]n *State v. Bonnell*, 8th Dist. Cuyahoga No. 55927, 1989 Ohio App. LEXIS 4982 (Oct. 5, 1989), this court merged the two separate murder counts and found that because the sentence for aggravated burglary was imposed outside of Bonnell's presence, he was to be resentenced on said count. Bonnell was resentenced to the same prison term on the aggravated burglary count on October 25, 1989. On May 21, 2010, 22 years after his conviction and sentence were initially imposed, Bonnell filed a "motion for resentencing and to issue a final appealable order."

Bonnell at ¶ 2.

[*P4] *Bonnell 2011* posed the following single

assignment of error: "The trial court erred by not granting Bonnell's motion to vacate because the purported judgment of conviction [for aggravated burglary] does not comply with Crim.R. 32(C) and *State v. Baker* [119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163]." *Id.* at ¶ 3. This court held that the omission of the aggravated burglary conviction from the entry and opinion constituted a lack of "technical compliance" with Crim.R. 32(C). *Bonnell 2011* at ¶ 10-11.

[*P5] This court further determined that the issuance of a [**3] nunc pro tunc entry that included the fact and manner of conviction was the proper remedy and also held that the final corrected entry is not an appealable order:

> The Ohio Supreme Court has found that the technical failure to conform to Crim.R. 32(C) does not render the judgment a nullity. *State ex rel. DeWine v. Burge*, 128 Ohio St.3d 236, 2011-Ohio-235, 943 N.E.2d 535, ¶ 19. * * *
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> "[T]he purpose of Crim.R. 32(C) is to ensure that a defendant is on notice concerning when a final judgment has been entered and the time for filing an appeal has begun to run." *[State v.] Lester*, [130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142], ¶ 20, citing *State v. Tripodo*, 50 Ohio St.2d 124, 127, 363 N.E.2d 719 (May 25, 1977); App.R. 4(A). Like the defendant in *Lester*, Bonnell had notice of his conviction, which was evident throughout the record, and was apparent to the defendant who had exhausted the appellate process. *See id.* at ¶13.
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> Similarly, in *State v. Fischer*, [128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332], the Ohio Supreme Court rejected the notion that a defendant could raise any and all errors relating to his conviction when his original sentence was deemed void for the failure to include postrelease control and he had already appealed his conviction. Instead, the court limited the scope of relief to correcting only the illegal sentence and found res judicata still applied to other aspects of the merits of the conviction. *Id. See, also, State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381 (applying law of the case and res judicata to convictions and unaffected sentences [**4] upon remand for an allied offenses sentencing error).
>
> Additionally, Ohio appellate courts have found that where a trial court issues a corrected judgment entry to comply with Crim.R. 32(C), a defendant who has already had the benefit of a direct appeal cannot raise any and all claims of error in successive appeals. *State v. Triplett*, 6th Dist. Lucas No. L-10-1158, 2011-Ohio-1713; *State v. Avery*, 3d Dist. Union No. 14-10-35, 2011-Ohio-4182, ¶ 14; *State v. Harris*, 5th Dist. Richland No. 10-CA-49, 2011-Ohio- 1626, ¶ 30. In such circumstances, res judicata remains applicable and the defendant is not entitled to a "second bite at the apple." *Avery* at ¶ 14. Aptly stated, "[n]either the Constitution nor common sense commands anything more." *Fischer* at ¶ 26. As argued by the state herein, to hold otherwise would open the floodgates and "enable validly convicted and sentenced prisoners throughout the state to circumvent res judicata by arguing, after all direct and collateral appeals are exhausted, that their sentencing documents are improperly worded[.]"

Bonnell 2011 at ¶ 13-17.

II. ASSIGNMENT OF ERROR

[*P6] In this appeal, Bonnell challenges the propriety of the nunc pro tunc entry, offering a single assignment of error:

> I. The trial court erred when it filed an illegal nunc pro tunc judgment entry, when a Crim.R. 32 final appealable order has never been filed in this case.

[*P7] Bonnell [**5] argues that the trial court's revised entry as a result of the nunc pro tunc is legally inadequate and does not constitute a final appealable order. Bonnell states that this court's reliance on *Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, and *Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, is incorrect. Those cases are distinguishable, Bonnell argues, because a final appealable order in a death penalty case consists of the judgment entry as well as the sentencing opinion. *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, syllabus and ¶ 17-18 (in capital cases, a "final, appealable order consists of both the sentencing opinion filed pursuant to R.C. 2929.03(F) and the judgment of conviction filed pursuant to Crim.R. 32(C)").

[*P8] The Ohio Supreme Court considered the capital case dichotomy in *State v. Thompson*, 141 Ohio St. 3d 254, 2014-Ohio-4751, 23 N.E.3d 1096. Thompson was sentenced to death for the aggravated murder of Twinsburg Police Officer Joshua Miktarian. A jury convicted Thompson of two counts of aggravated murder with each count carrying three death

specifications: (1) purposely killing a law enforcement officer, R.C. 2929.04(A)(6); (2) killing to escape detection, R.C. 2929.04(A)(3); and (3) killing while under detention, R.C. 2929.04(A)(4). *Id.* at ¶ 2.

[*P9] The jury also convicted Thompson of escape, resisting arrest, tampering with evidence, and carrying a concealed weapon. Pursuant to Crim.R. 29, the court dismissed one escape count and merged the two aggravated murder [**6] convictions and two of the three death specifications for the mitigation hearing and sentencing. *Id.* at ¶ 32-34.

[*P10] After the mitigation hearing and the jury's unanimous recommendation of the death penalty, the court sentenced Thompson to death for one count of aggravated murder, R.C. 2903.01(E), with two death specifications — purposely killing a police officer, R.C. 2929.04(A)(6), and killing to escape detection, R.C. 2929.04(A)(3). The three counts of tampering with evidence were also merged and the court imposed various sentences for the remaining charges. *Id.*

[*P11] Thompson raised 18 propositions of law in his appeal of the aggravated murder conviction and death sentence. Of import here is his first proposition of law: "Thompson challenges this court's jurisdiction to hear his appeal because, he claims, the trial court failed to issue a final, appealable order in compliance with Crim.R. 32(C)." *Id.* at ¶ 36.

[*P12] The *Thompson* court explained that, in capital cases:

> R.C. 2929.03(F) requires the court or panel to file a sentencing opinion. *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, syllabus and ¶ 17-18. In those cases, "a final, appealable order consists of *both* the sentencing opinion filed pursuant to R.C. 2929.03(F) and the judgment of conviction filed pursuant to Crim.R. 32(C)." *Id.* at syllabus.

(Emphasis added.) *Thompson* at ¶ 39.

[*P13] The *Thompson [**7]* trial court issued a sentencing opinion on June 23, 2010, that was signed by the judge and journalized, listing the capital death sentence and the sentences for the noncapital counts. *Id.* at ¶ 40. On June 24, 2010, the court filed a separate entry recording the jury verdict of guilt on all 26 counts and specifications that was also signed by the judge and journalized. *Id.* "Together, those two documents comply with the requirements of Crim.R. 32(C) and thus constitute a final, appealable order. *See Ketterer* at ¶ 17." *Id.*

[*P14] Thompson argued that the two documents in his case did not satisfy Crim.R. 32(C) because, (1) the June 24 entry was subsequently replaced by a nunc pro tunc entry and (2) the sentencing opinion contained an error. The Supreme Court first addressed the nunc pro tunc issue:

> First, Thompson argues that when a nunc pro tunc entry corrects an earlier entry, it entirely replaces the original entry. In this case, the trial court's June 24 entry mistakenly stated that Thompson's "sentencing hearing commenced on June 10, 2006." The sentencing hearing actually began on June 10, 2010. On July 1, 2010, the trial court entered a nunc pro tunc entry to change the erroneous date in the June 24 entry. Thompson [**8] says we can look only to the nunc pro tunc entry, and not to the June 24 entry, to evaluate compliance with Crim.R. 32(C).
>
> Thompson's argument misconstrues the nature of a nunc pro tunc entry. As we recently explained in *Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, the phrase "'[n]unc pro tunc' * * * is commonly defined as '[h]aving retroactive legal effect through a court's inherent power.'" *Id.* at ¶ 19, quoting *Black's Law Dictionary* 1174 (9th Ed.2009). Therefore, "a nunc pro tunc entry by its very nature applies retrospectively to the judgment it corrects." *Id.* But a nunc pro tunc entry does not replace the original judgment entry; it relates back to the original entry. Thus, we need not disregard the trial court's June 24 entry.

Id. at ¶ 43.

[*P15] The court next responded to the challenge of the sentencing opinion error:

> Second, Thompson claims that there is no final, appealable order here because the trial court's June 23 sentencing opinion contains an error. The opinion sentenced Thompson on Count 3 (third degree felony escape), despite the fact that the court had previously dismissed that count. In the opinion, the court purported to merge Count 3 with Count 4 (fifth degree felony escape) and then sentenced Thompson to five years on the two merged counts. [**9] This five-year sentence would have been appropriate for Count 3, but it exceeded the maximum 12-month punishment permitted for

> Count 4 alone. *See* R.C. 2929.14(A)(5) (authorizing a maximum sentence of 12 months' imprisonment for a fifth degree felony); R.C. 2929.14(A)(3) (authorizing a maximum sentence of five years' imprisonment for a third degree felony). Because Thompson should have been sentenced only on Count 4, not on Count 3, he could not have been sentenced to the five-year sentence the court imposed.
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> Contrary to Thompson's claims, the trial court's mistaken reference to a five-year sentence in the June 23 sentencing opinion does not deprive this court of jurisdiction over this appeal. "[S]entencing errors are not jurisdictional." *Manns v. Gansheimer*, 117 Ohio St.3d 251, 2008-Ohio-851, 883 N.E.2d 431, ¶ 6 (holding that extraordinary writs are not available to remedy sentencing errors). Instead, sentencing errors can be remedied on appeal in the ordinary course of law. *State ex. rel Davis v. Cuyahoga Cty. Court of Common Pleas*, 127 Ohio St.3d 29, 2010-Ohio-4728, 936 N.E.2d 41, ¶ 2 (the erroneous inclusion of post release control in a sentencing entry can be remedied on appeal).
>
> To determine the appropriate remedy here, we need only look to the trial court's entries. Although the June 23 sentencing opinion mistakenly referred to Count 3 and a five-year sentence for escape, the trial court's June 24 journal entry [**10] eliminated these erroneous references. The June 24 entry states that for the crime of escape, Thompson is sentenced to only 12 months, and only on Count 4. The entry removes any reference to a five-year sentence for escape and contains no sentence whatsoever for Count 3. The record therefore, clearly indicates that for the crime of escape, the trial court intended to impose a 12-month sentence on a single fifth degree felony count. Accordingly, this is the only escape sentence that applies to Thompson.
>
> In sum, we may properly consider both the trial court's June 24 entry and its sentencing opinion to evaluate compliance with Crim.R. 32(C). *These two documents satisfy the requirements for a final, appealable order, and thus we do have jurisdiction over Thompson's appeal*.

(Emphasis added.) *Id.* at ¶ 44-47.

[*P16] Further, as to the propriety of employing the nunc pro tunc entry to correct the technical error in this case, a nunc pro tunc entry is properly used to show what actually happened in the court as supported by the record. "Such an entry is to be used to reflect what a trial court actually did, not what the court might or should have done. *State ex rel. DeWine v. Burge*, 128 Ohio St.3d 236, 2011-Ohio-235, 943 N.E.2d 535, ¶ 17, citing *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, 779 N.E.2d 223, ¶ 14." *Bay Village v. Barringer*, 8th Dist. Cuyahoga No. 100959, 2014-Ohio-4816, ¶ 24.

[*P17] From the March 3, 1988 entry of the trial court [**11] memorializing the verdict of the jury finding, throughout the direct appeals as well as postconviction proceedings to date, the record reflects the convictions for aggravated murder and aggravated burglary. Thus, the nunc pro tunc entry is appropriate. "Nunc pro tunc entries are used to make the record reflect what the court actually decided * * *." *Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 18.

[*P18] We hold that, in light of the guidance provided in *Thompson* as to capital cases, coupled with the Ohio Supreme Court's further elaboration in *Lester*, *Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, and *Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, syllabus and ¶ 17-18, the nunc pro tunc entry and sentencing opinion in this case properly and adequately meet the elements of Crim.R. 32(C). We further hold that nunc pro tunc was the appropriate vehicle to cure the technical error in this case.

[*P19] It is clear that the policy and purpose of Crim.R. 32, R.C. 2929.03(F) and a defendant's right to due process have been fulfilled. We reiterate:

> Ohio appellate courts have found that where a trial court issues a corrected judgment entry to comply with Crim.R. 32(C), a defendant who has already had the benefit of a direct appeal cannot raise any and all claims of error in successive appeals. 2*Triplett*, 6th Dist. Lucas No. L-10-1158, 2011-Ohio-1713; *Avery*, 3d Dist. Union No. 14-10-35, 2011-Ohio-4182, ¶ 14; *Harris*, 5th Dist. Richland No. 10-CA-49, 2011-Ohio-1626, ¶ 30. In such circumstances, res judicata remains applicable and the [**12] defendant is not entitled to a "second bite at the apple." *Avery*, at ¶ 14. Aptly stated, "[n]either the Constitution nor common sense commands anything more." *[State v.] Fischer*, 128 Ohio St.3d 92, [2010-Ohio-6238, 942 N.E.2d 332], ¶ 26. As argued by the state herein, to hold otherwise would open the floodgates and "enable validly convicted and sentenced prisoners throughout the state to

> circumvent res judicata by arguing, after all direct and collateral appeals are exhausted, that their sentencing documents are improperly worded[.]"
>
> In this case, all parties were aware that Bonnell _was convicted by a jury on the aggravated burglary charge for which he was sentenced, as evidenced by his appeal of that charge. Further, the reviewing courts exercised jurisdiction over his appeals, and heard and decided his case. Thus, unlike the defendant in *Baker*, Bonnell was not deprived the opportunity to appeal his conviction. Rather, Bonnell was given full opportunity to litigate all of the issues relating to his conviction and sentence, and his substantive rights were not prejudiced in any way.

Bonnell 2011 at ¶ 17.

[*P20] This appeal, therefore, is dismissed.

It is ordered that appellee recover from appellant costs herein taxed. The court finds there were reasonable grounds for [**13] this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANITA LASTER MAYS, JUDGE

LARRY A. JONES, SR., P.J., and

EILEEN A. GALLAGHER, J., CONCUR

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State v. Bonnell

Supreme Court of Ohio

March 15, 2017, Decided

2015-2047.

Reporter
2017 Ohio LEXIS 433 *; 148 Ohio St. 3d 1425; 2017-Ohio-905; 71 N.E.3d 297

State v. Bonnell.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: Cuyahoga App. No. 102630, 2015-Ohio-4590 [*1] .

State v. Bonnell, 2015-Ohio-4590, 2015 Ohio App. LEXIS 4555 (Ohio Ct. App., Cuyahoga County, Nov. 5, 2015)

Opinion

APPEAL NOT ACCEPTED FOR REVIEW

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